

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
AWCC NO. F211113**

ROGER MEELER, EMPLOYEE

CLAIMANT

VS.

RELIANCE WELL SERVICE, EMPLOYER

RESPONDENT

LIBERTY MUTUAL INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED AUGUST 5, 2003

Hearing held June 19, 2003, in El Dorado, Arkansas, before *ADMINISTRATIVE LAW JUDGE KAREN McKINNEY*.

Claimant is represented by Mr. Matthew Shepherd, Attorney at Law, 423 North Washington, El Dorado, Arkansas 71730-5615.

Respondents are represented by Mr. Mike Ryburn, Attorney at Law, 10825 Financial Centre Pkwy., Suite 136, Little Rock, AR 72211.

STATEMENT OF THE CASE

The above-styled claim came on for a hearing in El Dorado, Arkansas, on June 19, 2003. A prehearing telephone conference was held on this claim on April 14, 2003, with a Prehearing Conference Order filed that same date. The Prehearing Conference Order was marked as Commission's Exhibit No. 1, and introduced into evidence without objection. Pursuant to the Prehearing Conference Order, the parties agreed upon the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
2. The employee-employer-carrier relationship existed between the parties on August 22, 2001;
3. The parties anticipate stipulating to the claimant's average weekly wage and compensation rates.

At the beginning of the hearing the parties were unable to stipulate to the claimants wage and compensation, but agreed to submit a joint stipulation on this issue subsequent to the hearing. Subsequent to the hearing, counsel for respondent advised, through a telephone conversation, that the parties agreed to stipulate to an average weekly wage sufficient to entitle the claimant to the maximum compensation rates.

During the prehearing telephone conference the parties agreed to limit the issues to:

1. Whether claimant sustained a compensable injury on or about August 22, 2001, for which he is entitled to indemnity and medical benefits;
2. If claimant sustained a compensable injury, whether he provided notice of an injury in a timely manner;
3. Controversion and attorney's fees.

With regard to these issues, claimant contends that he had a gradual on-set back injury that was further injured as a result of a fall on August 22, 2001, which resulted in a herniated disc requiring surgical repair. Claimant contends that his fall was witnessed by a co-worker, that he timely reported the injury, that he is entitled to temporary total disability benefits from October 11, 2001, through a date yet to be determined, medical benefits, and an attorney's fee. Conversely, respondents contend that the claimant was not injured in the course and scope of his employment. Respondents further contend that if the claimant is alleging a gradual

onset injury, the major cause of his problem is degenerative disc disease and not an injury at work. Alternatively, respondents contend that notice of a work related injury was not provided until August 20, 2002, and therefore, respondents are not liable for any benefits incurred prior to providing notice.

From a review of the record as a whole, to include the medical reports, documents, and all other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. § 11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the prehearing telephone conference conducted on April 14, 2003, and contained in the Prehearing Order filed that same date, are hereby accepted as fact.
2. Claimant earned sufficient wages to entitle the claimant to the maximum compensation rates should his claim be compensable.
3. Claimant has failed to prove by a preponderance of the evidence that he sustained a specific incident injury on August 22, 2001.
4. Claimant has failed to prove by a preponderance of the evidence that he sustained a gradual onset injury to his back that is the major cause of his disability or need for treatment.

CONCLUSION

Claimant began working for respondents in 1994. Claimant described his job as an oil field roughneck to sometimes be “pretty hard work”. Claimant contends that he sustained a specific incident injury on August 22, 2001, when he tripped and fell while changing out a pipe round. Claimant described the incident as follows:

We were changing out a pipe round, and them things weigh probably 100 pounds or better, and I lifted one up and carried it off around the door there and I tripped and fell on a lift, tripped over it and fell and I didn't think you know, I done any damage to my back, you know, other than something like a pulled muscle so I didn't pay it no attention, I just kept working.

Claimant testified that his fall was witnessed by a co-worker named Tommy Tompkins.

Claimant sought medical treatment from Laura Douglas, a chiropractor, who later referred the claimant to Dr. Robert Germann, an orthopedic specialist.

With regard to reporting the injury, claimant testified as follows:

“A. [Mr. Meeler] I told them I hurt my back but I didn't know how I hurt it at the time because I was working from August to October and I couldn't pin point what date or what time the injury was. So later on to get that exact information I had to go back through the files at the office.

“Q. [Mr. Shepherd] When you say that you do not know when it happened or how it happened, do you know that you injured your back while working at Reliance Well Service?

“A. I know I did.

“Q. Do you know specifically what day you hurt your back?

“A. After looking at the files I do.

“Q. And what day do you contend that is?

“A. August 22nd, 2001.

“Q. Who did you report your injury to?

“A. (No response.)

“Q. To whom did you report your injury?

“A. Well, I went to Terri Story and told her that I had hurt my back somehow and other, that I was going to have to have— To find some other help, I was going to be off a while.

“Q. Did you inquire as to workers’ compensation?

“A. I asked her what I needed to do, you know, get on workers’ comp or what they wanted to do about it.

“Q. And what did she tell you?

“A. She told me she had to get with Max Story.” [T14-15]

On cross-examination, claimant admitted that he told Ms. Story “...I didn’t know how I hurt my back.” Claimant further testified that he was scared about losing his job when he reported his injury because he had just bought a house. It was not until a later date that he went through his employer’s records that he was able to arrive upon a date on which he got hurt. Claimant further testified:

“Q. [Mr. Ryburn] But you knew that you had fallen with a heavy object in your hands when you told Ms. Story that you did not know if you had hurt yourself at work or not?

“A. [Mr. Meeler] I told Ms. Story that I didn’t know how I had hurt my back but I had hurt my back. You know, I couldn’t come up with no specific date without looking through the paperwork.

“Q. But you did not even tell her about the incident itself much less that date, right?

“A. No. I didn’t.” [T29]

Claimant’s employer continued to send the claimant \$800.00 every two weeks during his convalescence until May 29, 2002. When asked why he continued to receive this money, claimant testified that his employer was just being nice, and helping him out.

Claimant testified that after this fall his lower back kept getting worse but he just kept on working. According to the claimant, about a month or so after this fall, he drove to work, but his legs were numb and he could not work. On cross-examination, claimant admitted that he had been having problems with his back even before he fell on August 22, 2001. Claimant denied going to the chiropractor on the day that he fell; however, the medical records from Dr. Douglas reflect that the claimant was seen and treated by her on August 21, 2001, and August 22, 2001. Dr. Douglas did not record a history of an injury or fall on either of these medical reports.

Claimant admitted that he has had back problems ever since his first back injury in 1996. Claimant began treating with Dr. Douglas for about a year prior to his alleged fall. When asked if he ever got over his back problems from the 1996

injury, claimant testified; "I think it still has something to do with it. I know I had to finish the day out the last day I worked with I injured myself the first time on my hands and knees." With regard to the history he provided Dr. Germann of having back problems for the past year, claimant testified that he has been having real bad muscle spasms in his back ever since 2000 when he got real hot at work one day.

When asked why he decided to file a workers' compensation claim, the claimant testified:

"A. [Mr. Meeler] Well, I mostly got, you know, stirred up about it when they told me it's best I go on and do something else. You know, that sort of put a thorn in my side. All I wanted to do is get better and get back out there to go to work but I never did get better. They think I should have but I didn't." [T31]

Terri Story testified on behalf of the respondents. Ms. Story testified that the claimant advised her in October of 2001, that his back was hurting, that he was having a lot of pain, and that he did not know what had happened or when it happened but that he needed some emergency funds because he was going to need surgery. Ms. Story further testified that she specifically asked the claimant at that time whether he had injured his back at work. According to Ms. Story the claimant said that he just couldn't say, that he did not know how he hurt his back. The claimant did not mention anything about a fall or a gradual work-related injury when he first reported his back problems. When the claimant spoke to the

Ms. Story in August of 2002, and wanted to file a workers' compensation claim, Ms. Story testified that she assisted the claimant with his paperwork.

The claimant's injury occurred after July 1, 1993, thus, this claim is governed by the provisions of Act 796 of 1993. The Full Commission has held that in order to establish compensability of an injury, a claimant must satisfy all the requirements set forth in Ark. Code Ann. § 11-9-102 as amended by Act 796. Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). When a claimant alleges that he sustained an injury as a result of a specific incident, identifiable by time and place of occurrence, he must prove by a preponderance of the evidence (1) the injury arose out of and in the course of his employment; and (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death. See Ark. Code Ann. § 11-9-102(4)(A)(i) and § 11-9-102(4)(E)(i) (Repl. 2002). He must also prove (3) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. See Ark. Code Ann. § 11-9-102(4)(A)(i). Moreover, the claimant must establish (4) that the compensable injury is supported by 'objective findings' as defined in § 11-9-102(16)." Ark. Code Ann. § 11-9-102(4)(D); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 31 Ark. App. 804, 20 S.W.3d 900 (2000). If the claimant fails to establish by a preponderance of the credible evidence any of the

requirements for establishing the compensability of the injury, he fails to establish the compensability of the claim, and compensation must be denied. Jerry D. Reed, supra.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). A claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985). Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

I do not find claimant's testimony of a slip and fall injury in August of 2001, to be credible. Claimant testified that this fall was witnessed by a co-worker, but he did not offer any evidence from this co-worker to corroborate his testimony. In this regard, claimant testified that the co-worker is no longer employed by respondents and that he has a job that requires him to travel quite a bit. However, the claimant offered no evidence that he attempted to subpoena the witness, nor did he make any efforts to obtain an evidentiary deposition of this alleged witness. Moreover, claimant did not report a work-related injury when he first advised his employer that he needed to be off work with his back problems.

Furthermore, the claimant's medical records fail to corroborate a history of a fall which is responsible for his medical condition. Claimant claims the fall occurred on August 22, 2001. Claimant was seen by Dr. Douglas on August 22, 2001, and there is no mention of a work related injury or fall on that date. When claimant first treated with Dr. Germann on October 19, 2001, claimant reported a history of low back pain over the past year, which has worsened over the last week. Not only had claimant stopped working on October 11, 2001, but this history is also inconsistent with the claimant's testimony of a fall at work causing his symptoms to increase.

Accordingly, I find that the evidence simply does not support a finding that the claimant sustained a specific incident injury on August 22, 2001. Claimant has failed to present any credible evidence that he injured himself at work on that date.

Since the claimant cannot establish that his injury was caused by a specific incident and is identifiable by time and place of occurrence the claimant's claim for a back injury is governed by A.C.A. § 11-9-102(4)(A)(ii)(b). To satisfy the definitional requirements for injuries falling under Ark. Code Ann. § 11-9-102(4)(A)(ii), the employee still must prove by a preponderance of the evidence that he sustained internal or external damage to the body as the result of an injury that arose out of and in the course of employment, and the employee still must establish the compensability of the claim with medical evidence, supported by objective findings. However, in addition to these requirements, if the injury falls under one of

the exceptions enumerated under Ark. Code Ann. § 11-9-102(4)(A)(ii), the "resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment." Ark. Code Ann. § 11-9-102(4)(E)(ii)(Repl. 2002). (Emphasis added.)

On this record, I find that the claimant has failed to prove by a preponderance of the evidence that a gradual onset back injury is the major cause of his disability or need for medical treatment. For purposes of the Arkansas Workers' Compensation Law, "major cause" means more than 50% of the cause. See A.C.A. § 11-9-102(14)(A). On this record, the claimant has failed to prove by preponderance of the evidence that an injury caused by his work was more than 50% of his disability or need for treatment. See Carter v. Arkansas State Univ., Full Commission Opinion filed July 18, 2000 (E808906 & E809040). Dr. Robert Germann stated in his correspondence to claimant's attorney dated December 13, 2002, that the "major cause" of claimant's "disability and need for treatment were the herniated disks." Dr. Germann opined that if the claimant "...did have a fall, that would account for his herniated disks." However, as noted above, I do not find claimant's account of a fall resulting in an injury to be credible. Dr. Germann further stated that the degree of claimant's degenerative condition is consistent with one who has spent the majority of his life working in the oil fields, and that the conditions of the claimant's employment could "aggravate the natural aging process". However, while these statements generally relate claimant's occupation to the

degenerative processes in claimant's spine, the claimant's work activity with this employer is not related to the herniated disc and the disability or need for medical treatment by more than 50%.

The medical records fail to support a finding of a gradual onset work-related injury. Claimant has been treated by a chiropractor off and on for several years. The first medical report in the record reveals treatment for back pain in July of 2000. Claimant related this pain in 2000 to his work, but he further indicated that he did not intend to file a workers' compensation claim. Claimant reported frequent pain and stiffness at that time. Claimant testified that he has had back pain since a work related injury in 1996, and a bout of heat exhaustion in 2000. Claimant did not relate his condition and need for treatment to his work until August 20, 2002, almost one year after the alleged fall and the precipitating factor for his need for treatment. Moreover, claimant testified that he did not decide to file a workers' compensation claim until after his employer ceased making voluntary payments to the claimant during the claimant's period of disability.

When I weigh the evidence, I cannot find that the claimant has proven by a preponderance of the evidence that he sustained a compensable gradual onset injury to his back. Claimant admitted that he has had ongoing problems for his back since an initial injury in 1996. The present claim is not a claim for additional benefits arising out of the 1996 claim, but rather a new claim arising out of an alleged specific incident or more recent gradual onset injury. Claimant's work as a

roughneck is described as “pretty hard” however; the claimant did not present sufficient evidence to relate this work to his herniated discs which are the major cause of his need for treatment. Consequently, I find that the claimant has failed to prove that his alleged work injury is the major cause of his disability or need for treatment.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he sustained either a compensable specific incident or gradual onset injury. Therefore, this claim is hereby denied and dismissed.

IT IS SO ORDERED.

HON. KAREN McKINNEY
Administrative Law Judge